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5 **NOT FOR PUBLICATION**

6 IN THE UNITED STATES DISTRICT COURT

7 FOR THE DISTRICT OF ARIZONA

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9 United States of America, ex rel. Patricia) No. CV-01-2253-PHX-FJM
10 Haight and In Defense of Animals,)
11 Plaintiffs,)
12 vs.)
13 Catholic Healthcare West, et al.,)
14 Defendants.)
15 _____)

16 **ORDER**

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18 The court has before it defendants' motion for attorneys' fees (doc. 216) and
19 memorandum in support (doc. 220), plaintiffs' response (doc. 226), and defendants' reply
20 (doc. 228). We also have plaintiffs' motion for review of clerk's costs determination (doc.
21 229), and defendants' response (doc. 230).

22 Plaintiffs filed this action under the False Claims Act, 31 U.S.C. §§ 3729-3733,
23 claiming that defendants made false claims in connection with a grant application to fund
24 medical research involving the use of dogs. We granted summary judgment in favor of
25 defendants (doc. 214). Defendants now seek an award of \$679,733.50 in attorneys' fees and
26 related non-taxable expenses pursuant to 31 U.S.C. § 3730(d)(4).

27 In *qui tam* cases, a court may award reasonable attorneys' fees to a prevailing
28 defendant if the plaintiff's claim was "clearly frivolous, clearly vexatious, or brought

1 primarily for purposes of harassment.” Id. An action is “clearly frivolous” when “the result
 2 is obvious or the [plaintiff’s] arguments of error are wholly without merit.” Pfingston v.
 3 Ronan Eng’g Co., 284 F.3d 999, 1006 (citation omitted). An action is “clearly vexatious”
 4 or “brought primarily for purposes of harassment” when the plaintiff “pursues the litigation
 5 with an improper purpose, such as to annoy or embarrass the defendant.” Id. The award of
 6 fees under § 3730(d)(4) is “reserved for rare and special circumstances.” Id. at 1006-07.

7 We initially denied defendants’ motion to dismiss, concluding that plaintiffs had
 8 sufficiently set forth legally viable claims in their complaint (doc. 58). In connection with
 9 the motions for summary judgment, we determined only after an extensive review of the
 10 evidence that the claims were without legal merit. We cannot engage in *post hoc* analysis
 11 of those claims. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421-22, 98 S. Ct.
 12 694, 700 (1978). Instead, we rely on the analysis set forth in our prior order (doc. 214) and
 13 conclude that plaintiffs’ claims were not so lacking in legal merit as to be deemed frivolous.

14 Defendants argue that we must nevertheless grant fees because plaintiffs acted with
 15 an improper motive in pursuing this case. They claim that Dr. Haight and In Defense of
 16 Animals used this litigation to advance their social agenda of stopping the use of animals in
 17 medical research. Defendants argue that this litigation was just another step in a long
 18 harassment campaign, which included picketing outside their place of business; holding press
 19 conferences and letter-writing campaigns in an effort to stop the research; and petitioning the
 20 Maricopa County Sheriff’s Office to file animal cruelty charges against Dr. Berens.

21 The purpose of the False Claims Act is to remedy fraud against the government, not
 22 to provide a vehicle for relators to pursue their own agenda. The question of imposing
 23 attorneys’ fees is problematic when a relator with an obvious social agenda asserts a facially
 24 meritorious claim. The False Claims Act provides for attorneys fees to a prevailing
 25 defendant when a plaintiff’s claims are “clearly frivolous” or “brought primarily for purposes
 26 of harassment.” 31 U.S.C. § 3730(d)(4). Although these criteria are presented as alternative
 27 grounds, they are nevertheless related in that evidence bearing on frivolousness will often be
 28 probative of improper purpose. See Townsend v. Holman Consulting Corp., 929 F.2d 1358,

1 1362 (9th Cir. 1990) (discussing these factors in the context of Rule 11 sanctions).

2 It is evident from plaintiffs' pre-litigation activities that they acted to advance their
 3 own social agenda. If evidence of an improper motive were our only consideration, our
 4 inquiry would end. However, § 3730(d)(4) provides that not only must evidence exist that
 5 plaintiffs were motivated by an improper purpose, but also that their claims were brought
 6 "primarily" for that purpose. Having previously concluded that plaintiffs' claims were not
 7 frivolous, we cannot say that the promotion of plaintiffs' social agenda was paramount over
 8 asserting their non-frivolous claims that, if successful, could have earned them a sizable
 9 award. Because there is no showing that plaintiffs' claims were brought primarily for
 10 purposes of harassment, we deny defendants' motion for attorneys' fees and non-taxable
 11 costs (doc. 216).

12 The issue of costs under Rule 54 (d)(1), Fed. R. Civ. P., presents an entirely different
 13 question. Rule 54(d)(1) provides that costs other than attorneys' fees "should be allowed
 14 to the prevailing party." "The unsuccessful litigant can overcome this presumption [in favor
 15 of the award of costs under Rule 54(d)] only by pointing to some impropriety on the part of
 16 the prevailing party that would justify a denial of costs. . . . A district court therefore must
 17 award costs unless the prevailing party is guilty of some fault, misconduct, or default worthy
 18 of punishment." U.S. ex rel. Lindenthal v. General Dynamics Corp., 61 F.3d 1402, 1414 (9th
 19 Cir. 1995) (applying Rule 54(d) in a False Claims Act case) (citation omitted).

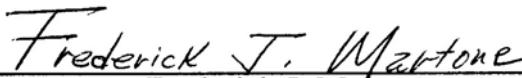
20 Plaintiffs claim that a permissive award of costs would chill the exercise of rights by
 21 *qui tam* litigants both in this case and other cases brought under the False Claims Act. Such
 22 a blanket exclusion of costs in False Claims Act cases was rejected in Lindenthal. Id. at
 23 1413-14. Because plaintiffs do not allege any impropriety or misconduct on the part of
 24 defendants, or otherwise present valid reasons to disallow defendants' costs, we deny
 25 plaintiffs' motion for review of costs (doc. 229), and allow costs in the amount taxed by the
 26 clerk.

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1 **IT IS ORDERED DENYING** defendants' motion for attorneys' fees and non-taxable
2 costs (doc. 216). **IT IS FURTHER ORDERED DENYING** plaintiffs' motion for review
3 of costs (doc. 229).

4 DATED this 29th day of February, 2008.

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8 Frederick J. Martone
9 United States District Judge

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